U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 February 2007

BALCA Case No.: 2006-INA-00052
ETA Case No.: D-05332-09490

In the Matter of:

PAGER PART MART, INC.
d/b/a
DBA CELL GATE USA,
Employer,

on behalf of

NAZANIN MALEKJAH,
Alien.

Appearance: Bob Platt, Esquire
Granda Hills, California
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER OF REMAND

PER CURIAM. The above-named Employer filed an application for labor certification on behalf of the Alien pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] During the course of processing the application, the

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised on Apr. 1, 2004),

Employer provided a statement indicating that the position had been filled by a U.S. citizen for several months. The U.S. Department of Labor Certifying Officer ("CO") denied the labor certification application on this basis. The Employer requested review pursuant to 20 C.F.R. §656.26 arguing that the U.S. citizen had actually been placed in a different job. We remand to the CO to consider the Employer's argument and evidence.

STATEMENT OF THE CASE

The Employer is a software development company seeking to fill the position of Bookkeeper. (AF 90). On April 18, 2002, it filed an application for permanent alien labor certification under the name Pager Part Mart, Inc. (AF 95). The Employer's original application listed a job requirement of a bachelor's degree in Computer Science, and two years of experience in the job offered. (AF 95). The bachelor's degree requirement was later removed by the Employer. (AF 90).[2] The Employer requested reduction in recruitment ("RIR") processing. (AF 93-94).

On May 5, 2006, the CO issued a Notice of Findings proposing to deny certification because the Employer did not appear to have re-advertised after it removed the bachelor's degree requirement. (AF 73-75). The CO stated that the Employer could rebut this finding by documenting that at the time of initial recruitment the advertisements did not contain any unduly restrictive job requirements, and by providing clarification as to the Employer's name because correspondence from the Employer showed a business name of "D/B/A: WebGateUSA.com." The Employer submitted rebuttal on June 6, 2006. (AF 33-72). In describing its post-application recruitment efforts, the Employer's President stated, in pertinent part:

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unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

[2] The Alien's educational qualifications were in computer science rather than accounting or bookkeeping. (AF 96, 115, 116). The Alien was unemployed at the time of the application in 2002, but had worked as a bookkeeper in Canada from 1996 to 2001. (AF 96 – reverse side of page).

> c) Job posting was placed at EDD CalJobs form 5/9/2005 to 6/4/2005 (see Exhibit D). As a result of this posting this office hired [a U.S. worker], who had worked for us from June to September 2005, and then terminated her employment since she found employment elsewhere.

(AF 36). Exhibit D is a "CalJOBS Job Listing Details" sheet, showing a listing for a "Bookkeeper," with requirements of two years of experience and a High School/GED, at the rate of $24,000/Year (negotiable), and a schedule of 31 to 40 hours per week.

On July 6, 2006, the CO issued a Final Determination denying certification. (AF 29-31). The CO was satisfied with the Employer's clarification about its business name (Pager Part Mart, Inc. d/b/a Cell Gate USA), and observed, apparently with approval, that the Employer had "submitted evidence of continuing, post-application recruitment efforts including an internal posting, an employee referral program, and a job order placed at the [California Employment Development Department ("EDD")] from May 9, 2005 to June 4, 2005. All of these post-application advertisements and recruitment efforts did not contain any unduly restrictive requirements." The CO, however, also observed that the Employer's rebuttal "revealed an important and previously undisclosed fact" -- that the job offer had been filled in June of 2005 by a U.S. worker who had been referred by the EDD. Although the U.S. worker only worked until September 2005 when she left for another job, the CO determined that once the job offer is filled, processing of a pending labor certification application ends. If the job then becomes vacant, the Employer may file a new application.

On August 3, 2006, the Employer filed a request for BALCA review. (AF 1-28). In the request the Employer argues that the U.S. worker was not hired for the position for which labor certification was sought, but rather as a "controller," a position which entailed different and more management related responsibilities. The Employer also noted that the U.S. worker had been hired only on a part time basis and at higher wage rate than the one being offered for the bookkeeper position.

DISCUSSION

BALCA has repeatedly held that labor certification may not be denied on the basis of evidence or an issue first raised in the Final Determination because such a procedure denies the employer the opportunity to rebut the previously undisclosed information. *Dr. & Mrs. Fredric Witkin*, 1987-INA-532 (Feb. 28, 1989) (en banc); *Phototake*, 1987-INA-667 (July 20, 1988) (en banc); *Tarmac Roadstone (USA), Inc.*, 1987-INA-701 (Jan. 4, 1989) (en banc); *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988) (en banc); *Bel Air Country Club*, 1988-INA-223 (Dec. 23, 1988) (en banc); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (en banc); *Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989) (en banc). Rather, when a CO wishes to rely on a new or substantially clarified basis for denial subsequent to the NOF, the CO should issue a supplemental NOF. *North Shore Health Plan*, 1990-INA-60 (June 30, 1992) (en banc).

In case now before us, the CO first raised the issue of whether the Employer had hired a U.S. worker to fill the position for which labor certification was being sought in the Final Determination. Although this panel has made a distinction between raising an entirely new issue in the Final Determination, and discussing the credibility of evidence presented in rebuttal, *see SBC Services*, 2003-INA-224 (Feb. 17, 2005), we find that the instant case clearly involved the raising of a new issue.

The CO had good cause for concluding that the application should be denied based on the hiring of a U.S. worker for the position given the Employer's statement in the rebuttal that a worker referred to it by EDD in response to its posting for a bookkeeper had been hired.[3] The CO's error, however, was that she should have raised

[3] This case was before the CO in the posture of a request for reduction in recruitment. Generally, when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). A referral for regular processing, however, is not mandated where an application is so fundamentally flawed that such a procedure would be pointless. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004) (no remand where the employer had not presented a bona fide job opportunity). Similarly, in this case the hiring of a U.S. worker for the position – if that is what happened – rendered the application moot, and further non-RIR processing would not be warranted.

the issue in a Supplement NOF rather than flatly denying the application without giving the Employer an opportunity to respond.

On appeal the Employer has presented a colorable argument, supported by some documentation, that the CO's conclusion that the U.S. worker had filled the position for which labor certification was being sought was factually inaccurate.

The dilemma for the Board on appeal is that the regulations preclude the Board's consideration of evidence or argument which was not within the record upon which the denial of labor certification was based. *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (en banc) (citing 20 C.F.R. §656.26(b)(4)). Thus, we must remand the case for the CO to issue a supplemental NOF to provide the Employer an opportunity to respond to the issue of whether the position had been filled by a U.S. worker.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification is hereby **VACATED** and the matter **REMANDED** for further proceedings consistent with the above.

For the Panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

J. Vittone, concurring.

I concur with the panel's decision to remand. In reviewing the Appeal File in this matter, several matters came to my attention that the CO may, in her discretion, investigate on remand. *Compare Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (en

banc) (the Board may direct the CO on remand to consider an issue not previously considered in the original NOF or the Final Determination),

The Employer argues on appeal that the U.S. worker was hired as a controller rather than a bookkeeper. As support for this contention, it points to the wage rate at which the U.S. worker was paid, the duties she was asked to perform, the fact that she was only a part-time worker, and the U.S. worker's educational degrees. Without deciding the matter, I make the following observations.

The Employer's rebuttal letter unambiguously states that the U.S. worker was hired when she responded to the Employer's CalJOBS posting for a bookkeeper. There is no evidence that the Employer was advertising for a controller or that the U.S. worker was seeking such a position. Rather, the U.S. worker's resume states her objective as "To start an accounting career which can use my skills." (AF 28, emphasis added). The Employer points to the U.S. worker's master's degree in accounting as evidence that she was overqualified for the bookkeeping position. However, close review of her resume does not necessarily support this contention. As noted, her stated objective was to "start" an accounting career. Moreover, her master's degree was obtained in Vietnam in 1999. From 2002 to 2004, however, she was taking courses such as "Accounting Clerk I & II" and "Computerized Accounting – Junior I & II" from the Central County Regional Occupational Program (CCROP). I take administrative notice that CCROP offers "career and technical education programs that prepare students for entry into Orange County's high-skill, high-wage job market" http://www.ropcentralcounty.tec.ca.us/welcome/ (visited Jan. 17, 2007). In other words, despite possessing a foreign master's degree, the U.S. worker was taking beginning level accounting coursework from a technical school in the U.S. shortly before applying for the job with the Employer. This circumstance suggests that, despite her educational achievement in Vietnam, the U.S. worker still considered herself a novice in the U.S. accounting field.

The Employer also pointed to the U.S. worker's higher rate of pay in 2005 as evidence that she was hired in a different position than the one for which labor

certification is being sought. However, I observe that this was not a vastly higher rate of pay ($14.00 an hour versus $11.50 an hour), and that the $11.50 an hour rate was based on the Prevailing Wage Determination the Employer obtained from the EDD in January 2001, which was expressly good only until February 24, 2002. (AF 113). I also note that the CalJOBS posting to which the U.S. worker responded offered a salary of $24,000 a year – or $11.50 per hour – but that this salary was negotiable. I take administrative notice that the OES/SOC for Financial Managers (which would include a job classification as a controller) in 2005 in Orange County, California shows level 1 wages of $29.25 an hour.

The Employer pointed to the pay check history of the U.S. worker as evidence that she was working only on a part-time basis (see AF 23-24, 26), and as evidence that she was not hired for the position for which labor certification was sought, which was to be a full-time position. I note, however, that the CalJOBS bookkeeper listing to which the U.S. worker responded in 2005 stated a work schedule of 31 to 40 hours per week. (AF 53).[4]

The Employer argued that the U.S. worker was hired to perform different duties than the bookkeeper position. This begs the questions of why the Employer stated in rebuttal that the U.S. worker was hired when referred from the CalJOBS listing for a bookkeeper. Who did the bookkeeping during the time that she was employed by the Employer? Did the Employer have a controller position before and after the U.S. worker was engaged? If so, do they have a job description? What were prior and subsequent controllers typically paid? Does the Employer have any documentation to show that the U.S. worker was employed as a controller, and used that title, and was given management level responsibilities?

Finally, even if the CO ultimately finds that the Employer did not, in fact, hire a U.S. worker for the position for which labor certification was sought, the question

[4] On the other hand, the CalJOBS listing for 2006 stated a 40 hour week, as did all the other post-application recruitment documents.

remains whether the Employer's post-application recruitment was sufficient to establish entitlement to a RIR. The CO conceded that the post-application recruitment did not contain unduly restrictive job requirements, but did not actually determine whether it was sufficient to grant an RIR because she decided that the application was mooted by the hiring of a U.S. worker. Thus, the question of whether to grant the RIR remains (if the CO finds that the finding about the hiring of a U.S. worker was in error). It is impressive that the Employer continued to advertise the job even after filing the labor certification application, and even offered a bonus to employees who referred a qualified applicant. I also note, however, that the Employer's 2005-2006 wage offer was based on a 2002 prevailing wage determination (which was based on a survey from January 2001) (*see* AF 113). Thus, the absence of applicants might have been as much the result of a low salary offer as an actual shortage of qualified U.S. workers. Moreover, as also noted above, I observe that at least one of the CalJOBS listings did not state a 40 hour a week position. Thus, it is not clear that the Employer's post-application recruitment efforts were sufficient for the granting of an RIR. Whether to grant an RIR, however, is a matter for the CO's discretion. The CO, however, does not need to reach the RIR issue if she finds that the Employer, in fact, filled the position with a U.S. worker. (*See* n.3 of the majority decision, *supra*).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service

of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.